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IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1972

No. 71-880

EDWIN RAY HAYNES; EDWIN RAY HAYNES, NEXT FRIEND OF JON HAYNES, A MINOR; EDWIN RAY HAYNES, NEXT FRIEND OF MICHAEL HAYNES, A MINOR; EDWIN RAY HAYNES, NEXT FRIEND OF RUTH ANN HAYNES, A MINOR; JON HAYNES; MICHAEL HAYNES AND RUTH ANN HAYNES,
Appellants,

vs.

CLIFFORD EUGENE LINDER,

AND

HAWKEYE SECURITY INSURANCE COMPANY, A CORPORATION,
Appellees.

APPEAL FROM THE SUPREME COURT OF MISSOURI

APPELLEE HAWKEYE SECURITY INSURANCE COMPANY'S MOTION TO DISMISS

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INDEX

Appellee Hawkeye Security Insurance Company's Motion to Dismiss 1

Conclusion 4

Cases Cited

Haynes v. *Linder and Hawkeye Security Insurance Company*, 323 S.W.2d 505 2

Landie v. *Century Indemnity Company*, 390 S.W.2d 558 2

Pierson v. *Allen*, 409 S.W.2d 127 3

Schott v. *Continental Auto Insurance Underwriters*, 31 S.W.2d 7 3

State ex rel. v. *Stubbs*, 471 S.W.2d 268 2

Wessing v. *American Indemnity Company of Galveston, Texas*, 127 F.Supp. 775 2

Zumwalt, et al. v. *Utilities Insurance Company*, 228 S.W.2d 750 2

Statutes Cited

Rule 67.01 Rules of Civil Procedure of the State of Missouri 3

Law Review Article

Keeton, Liability Insurance and Responsibility for Settlement, 67 Harvard Law Review, 1136 2

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Comes now appellee Hawkeye-Security Insurance Company and moves the Court to dismiss appellants' appeal on the grounds that said appeal does not present a substantial federal question and that the judgment ap-

pealed from rests on an adequate non-federal basis and the opinion of the Missouri Supreme Court does not constitute discrimination and denial of due process and equal protection.

The appellants have no cause of action against Hawkeye, having exhausted all of their cause of action in the original garnishment against Hawkeye which culminated in the "insurance money being applied to the satisfaction of the judgment" (*Haynes* v. *Linder and Hawkeye-Security Insurance Company*, Mo. App., 323 S.W.2d 505.) Any further cause of action for recovery in excess of this sum is for damages and is vested in appellee Linder alone and appellants have no right of action to maintain against Hawkeye. *Zumwalt, et al.* v. *Utilities Insurance Company*, Mo., 228 S.W.2d 750; *Landie* v. *Century Indemnity Company*, Mo. App., 390 S.W.2d 558; *State ex rel.* v. *Stubbs*, Mo., en banc, 471 S.W.2d 268; *Wessing* v. *American Indemnity Company of Galveston, Texas*, (District Court of Missouri) 127 F.Supp. 775. See Keeton, Liability Insurance and Responsibility for Settlement, 67 Harvard Law Review, 1136, 1175:

> "* * * The excess liability of company arises out of the relationship between insured and company. *Claimant is a stranger to that relationship.* Not only is company without any duty to claimant to accept claimant's reasonable settlement offer, but also, if there is a sizeable disparity between the settlement offer and the amount of the judgment obtained in the trial which follows refusal of the offer, claimant is benefited rather than harmed by company's refusal to settle. *It would therefore be anomalous to permit claimant to recover directly against company in his own right* * * *." (emphasis supplied)

Thus, appellants have no right of action against Hawkeye, but must look to appellee Linder for recovery of their "excess" judgments. The holding of the Missouri Supreme Court that appellants are limited to the monetary limitations set out in Section 379.200 does not deny them any rights against Hawkeye since they do not have any rights against that company independent of appellee Linder. The Supreme Court has merely said that they cannot do by indirection what is not permitted by direct action. Appellants' only claim against Hawkeye has always been for the amount of "the insurance money" involved. All claims for excess amounts have always been against appellee Linder and these claims have been left intact since his Petition was dismissed with the stipulation that such action should have no bearing on the Cross-claim of the appellants. The Haynes had exhausted "the insurance money" by their former equitable garnishment. (*Schott* v. *Continental Auto Insurance Underwriters*, 31 S.W.2d 7, 12 held that the remedy provided for by the statute was essentially that of a creditor's bill or equitable garnishment.)

Since appellants have no cause of action against Hawkeye for the excess judgments and since such cause of action is vested in Linder alone he was entitled to dismiss his action and the courts are bound to accept such dismissal pursuant to Rule 67.01 of the Rules of Civil Procedure of the State of Missouri:

> "A plaintiff shall be allowed to dismiss his action without prejudice at any time before the same is finally submitted to the jury, or the court sitting as a jury, or to the court, and not thereafter. * * *"

See *Pierson* v. *Allen*, (Supreme Court of Missouri) 409 S.W.2d 127, 130 which held:

"A stipulation is an agreement between counsel with respect to business before a court, and is not one of the usual pleadings, but is a proceeding in the cause and such is under the supervision of the court. * * * They are controlling and conclusive, and courts are bound to enforce them."

CONCLUSION

The opinion of the Supreme Court of Missouri does not deny appellants any rights to which they were entitled since the only claim they ever had against Hawkeye was "to reach and apply the insurance money to the satisfaction of their judgments", which has already been done. Nor does it deny appellants any rights that they had against Linder, since they are still free to proceed against him under the judgments that they have. Appellants are not denied the equal protection of the law and due process of law and this case does not present a substantial federal question and the judgment rests on an adequate non-federal basis. Appellee's Motion to Dismiss this appeal should be sustained.

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